THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

Riga, October 29, 2003

JUDGMENT

in the name of the Republic of Latvia

in case No. 2003 – 05 – 01

The Republic of Latvia Constitutional Court in the body of the Chairman of the Court session Aivars Endziņš, justices Romāns Apsītis, Ilma Čepāne, Juris Jelāgins, Andrejs Lepse, Ilze Skultāne and Anita Ušacka, with the secretary of the Court session Linda Vīnkalna,

in the presence of the submitter of the constitutional claim Sarmīte Elerte and her authorized representative Jautrīte Briede,

as well as the representative of the Saeima, the institution, which has passed the challenged act - Gunārs Kusiņš

under Article 85 of the Republic of Latvia Satversme (Constitution), Articles 16 (Item 1) and 17 (Item 11 of the first part) of the Constitutional Court Law

in Riga on September 30, 2003 in the public hearing reviewed the case

"On the Compliance of Article 271 of the Criminal Law with Articles 91 and 100 of the Republic of Latvia Satversme (Constitution)".

The establishing part

1. Legal liability for defamation and injuring dignity of a person in Latvia is determined both in the Criminal Law and the Civil Law.

1.1. On June 17, 1998 the Republic of Latvia Saeima (henceforth – the Saeima) passed the Criminal Law. Article 271, incorporated into its XXII Chapter ”Criminal Offences against Administrative Order”, determines: ” the committing of bringing into disrepute of a representative of public authority or other State official, or of defamation of such persons in connection with their professional duties, shall be punished by deprivation of liberty for a term not exceeding two years, or custodial arrest, or community service, or a fine not exceeding sixty times the minimum monthly wage”.

1.2. Chapter XV of the Criminal Law ”Criminal Offences against Personal Liberty, Honour and Dignity” incorporates norms, which protect honour and dignity of every person.

Article 156 determines: ”The committing of intentional defamation or demeaning the dignity of a person orally, in writing, or by acts, shall be punished by custodial arrest, or a fine not exceeding ten times the minimum monthly wage”.

Article 157 establishes: ”The committing, knowingly, of intentional distribution of fictions, knowing them to be untrue and defamatory of another person, in printed or otherwise reproduced material, as well as orally, if such has been done publicly (bringing into disrepute), shall be punished by custodial arrest, or a fine not exceeding twenty times the minimum monthly wage.

Article 158 determines: ”The committing of defamation or bringing into disrepute in mass media, shall be punished by deprivation of liberty for a term not exceeding one year, or custodial arrest, or community service, or a fine not exceeding thirty times the minimum monthly wage.

1.3. Civil liability for deliberate defamation or demeaning the dignity of a person is determined in the fourth part of the renewed version of the 1937 Republic of Latvia Civil Law (henceforth – the Civil Law) ”Obligations Law”, which is in effect since March 1, 1993. By December 22, 1992 Law ”On Amendments and Supplement of the 1937 Republic of Latvia Civil Law in the Part on Obligations Law”, the Civil Law was supplemented with a new Article 2352.a. It determines:” Each person has the right to bring court action for the retraction of information that injures his/her reputation and dignity, if the disseminator of the information does not prove that such information is true. If information, which injures a person’s reputation and dignity, is published in the press, then where such information is not true, it shall also be retracted in the press. If information, which injures a person’s reputation and dignity, is

included in a document, such document shall be replaced. In other cases, a court shall determine the procedures for retraction. If someone unlawfully injures a person's reputation and dignity orally, in writing or by acts, he/she shall provide compensation (financial compensation). A court shall determine the amount of the compensation.

2. The right of everybody to the protection of person's reputation and dignity is determined in the Republic of Latvia Satversme (henceforth – the Satversme) and international instruments binding on Latvia.

2.1. Article 95 of the Satversme inter alia determines:" The State shall protect human honour and dignity".

2.2. Article 12 of the Universal Declaration of Human Rights adopted by the United Nations Organization on December 10, 1948 (henceforth – the Declaration) determines: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".

2.3. On December 16 1966 the UNO General Assembly adopted the International Covenant on Civil and Political Rights (henceforth – the Covenant). Article 17 of the Covenant determines:"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks".

3. The right to freedom of expression is determined in the Satversme and in international instruments binding on Latvia.

3.1. Article 100 of the Satversme establishes: "Everyone has the right to freedom of expression, which includes the right to freely receive, keep and distribute information and to express their views. Censorship is prohibited".

3.2. Article 19 of the Declaration determines: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

3.3. Article 19 of the Covenant determines: " 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to

seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health and morals."

3.4. Article 10 (the first part) of the Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth – the Convention), passed by the European Council on November 4, 1950 establishes: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises".

4. Restrictions of the right to freedom of expression are envisaged in the Satversme, Convention, the laws and codes of ethics of mass media.

4.1. Article 116 of the Satversme inter alia determines that the rights of persons set out in Article 100 of the Satversme may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic structure of the State, and public safety, welfare and morals.

4.2. Referring to freedom of expression Article 10 (the second part) of the Convention determines: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

4.3. Article 7 of the Law "On the Press and Other Forms of Mass Media" (henceforth – the Press Law) among other things determines:" It is prohibited to publish information, which offends the honour and respect of, or slanders any legal entity or physical person". In its turn Article 25 of the Law establishes: "The journalist's obligation is: 1) to provide truthful information; (…) 4) to refuse to fulfill any assignment, the execution of which is associated with the violation of laws; 5) to observe the rights and legal interests of the State, public organizations, entrepreneurial companies (enterprises) and citizens".

4.4. On April 28, 1992 the Union of Latvian Journalists adopted the Code of Ethics. Item 1 of Chapter II establishes: ”The main task of a journalist is to guarantee that the public receives truthful and reliable information”. Item 2 determines: ”The exposition of facts shall be objective, clear and unequivocal and disclose the most important connections, without any misrepresentation”. Item 1 of the III Chapter in its turn determines: ” The editor (…) is responsible for the information, published (announced) in the newspaper, magazine, on TV or radio. He/she has to ensure precise and proper flow of information as well as free exchange of viewpoints”. Item 1 of the V Chapter establishes: ”The journalist shall critically evaluate the source of information and verify both the information and the quoted phrases”. Item 3 determines: ” The facts of a publication shall be clearly and unambiguously separated from the author’s commentary”.

On May 14, 2001 a new Code of Ethics – the Code of Professional Ethics of the Latvian Press, Radio and Television - was adopted. It was signed by the heads of seven Latvian newspapers and one radio station. It determines the fundamental principles:” Mass media shall disclose the truth as much as it is possible. The interests of the readers/listeners/audience are more important than those of the owners, sources of news and advertising agents. Editors and journalists shall be objective and may not use the contents of articles (radio or TV broadcasts) in their own interest”. Thus, Item 1 establishes: ”Impart truthful news. Be critical to sources of information! Verify facts and figures, even if they have been published earlier. Do it as thoroughly as possible! Give the possibility to the reader/ receiver of news the possibility of distinguishing facts from commentaries”.

5. The concept of the representative of state authority is determined in the Criminal Law and the Law ”On Prevention of Conflict of Interest in Activities of Public Officials” (henceforth – the Prevention of Conflict of Interest Law).

5.1. Article 316 of the Criminal Law determines: ” Representatives of State authority, as well as any person who permanently or temporarily performs their duties in the State or local government service and who has the right to make decisions binding on other persons, or who has the right to perform any functions regarding supervision, control, inquiry, or punishment or to deal with the property or financial resources of the State (central) or local government, shall be regarded as State officials. 2) The President, members of the Saeima, the Prime Minister, members of the Cabinet as well as officials of State institutions who are elected, appointed or confirmed by the Saeima or the Cabinet, heads of the local government, their deputies and executive directors shall be regarded as State officials holding a responsible position. 2) Public officials of foreign states, members of foreign public assemblies (the institution performing legislative or executive functions), officials of international organizations, members of international parliamentary assemblies as well as the

judges and officials of international courts shall also be regarded as State officials.

5.2. Article 4 of the Prevention of Conflict of Interest Law determines: ”1.) Public officials are: (1) the President; (2) members of the Saeima; (3) the Prime Minister, Deputy Prime Ministers, Ministers, Ministers for Special Assignments, State Ministers and Parliamentary Secretaries; (4) the head of the Chancellery of the President of Latvia and his/her deputy, the Director of the Saeima Chancellery and his or her deputy; (5) advisors to the President, advisors, consultants and assistants as well as heads of the Offices of the Prime Minister, Deputy Prime Ministers, Ministers for Special Assignments and State Ministers; (6) the Governor of the bank of Latvia, his or her deputy and members of the Board of Governors of the Bank of Latvia; (7) the Auditor General, members of the Council of the State Audit Office, members of the Collegia of the Audit Departments of the State Audit Office and the administrator of the Chancellery of the State Audit Office; (8) the Chairperson of the Central Electoral Commission, his or her deputy and the Secretary of the Central Electoral Commission; (9) the Director of the Constitution Protection Bureau and his or her deputy; (10) the head of the Prevention and Combating of Corruption Bureau and his or her deputy; (11) the head of the Prevention of the Laundering of Proceeds from Crime Service and his or her deputy; (12) the Director of the National Human Rights Office and his or her deputy; (13) members of the National Broadcasting Council of Latvia, members of the Council of the Public Utilities Commission, members of the Council of the Finance and Capital Market Commission; (14) chairpersons of local government city councils (parish or district councils) and their deputies, executive directors of local governments and their deputies; (15) councilors of local government city councils (parish or district councils); (16) heads of State or local government institutions and their deputies; (17) civil servants of the general or specialized State Civil Service; (18) members of councils or executive board of those capital companies in which the State or local government share of the equity capital separately or in aggregate exceed 50 percent; (19) members of councils or executive boards of State or local government capital companies; (20) representatives of the holder of the state or local government share of capital and their authorized persons; (21) judges, prosecutors, sworn notaries and sworn bailiffs; and (22) professional service soldiers and military employees of the National Armed Forces.

2.) Persons who in the performance of the duties of office in the State or local government authorities, in accordance with regulatory enactments, have the right to issue administrative acts, as well as to perform supervision, control, inquiry or punitive functions in relation to persons who are not under their direct or indirect control, or to deal with the property of the State or local government, including financial resources, shall also be considered to be public officials.

3) Persons, who perform duties of office outside the State or local government authorities shall also be considered as public officials if in accordance with the regulatory enactments the state or local government has permanently or temporary delegated to them any of the functions referred to in Paragraph two of this Article".

6. The Saeima has repeatedly received proposals on deleting Article 271 from the Criminal Law.

6.1. In autumn of 2002 the deputy L.Muciņš expressed such a proposal. He pointed out:"… several moments do not comply with those principles of a law-based state, which were fixed at the beginning of nineties, neither when renewing the Republic of Latvia Satversme, nor when supplementing the Satversme with Chapter VIII, and also when advancing democracy and developing the understanding of democracy. We may approach these problems in different ways and keep developing democracy. And one of the most important manifestations of democracy is freedom of expression (…). Articles 91 and 271 are not applied in court practice; besides "sifting" persons on the basis of their posts, included in the Articles (…) also does not comply with the principles of a democratic state (*see the Verbatim report of the seventh- October 17, 2002 Saeima autumn session).* However Muciņ'š proposal was turned down by both – the Defense and Internal Affairs Committee and vote of the Saeima deputies.

6.2. On May 2, 2003 deputies S.Mellupe, G.Bērziņš and A.Latkovskis submitted prosposals to the Defense and Internal Affairs Committee at first - to delete Article 91 and later also Article 271 from the Criminal Law. The above Committee turned the proposal down. When debating on the Articles during the second reading of the draft law "Amendments to the Criminal Law" G.Bērziņš pointed out: "…as regards furnishing false information we shall all be equal, we shall all have equal rights . To my mind it would be the only democratic situation (*see the Verbatim report of the fifth- May 22, 2003- Saeima spring session).* The deputy P. Simsons had a different viewpoint: "We have to realize in what state and situation we live and what we have received from the previous coalitions. This is the society with a deformed understanding of honour, respect, responsibility, duty and rights. Everything that our colleague G.Bērziņš tells would be normal and to be supported if at the time, when the term of our authority ends there will be a law-based state with a fair court , where the public confides in the police and state

officials as well as in the information, furnished by mass media" (*the above source).* In his turn deputy B.Cilēvičs has pointed out: "… it is doubtful if court decisions and particular judgments is the right way of teaching the standards of democracy to the society, and to his mind retaining of this norm (*Article 91 of the Criminal Law – remark of the Constitutional Court)* causes danger of suppressing freedom of expression. In these issues one has to look for a fair balance between freedom of expression and violation of the rights of any person or individual. However, in this case I hold that in practice the norm will not work. Thus the objectives, which the legislator has chosen, when incorporating the norm into the Law, shall never be implemented in practice" (*the same source).*

7. On January 3, 2003 the President of the Stock Company "Diena" Arvils Ašaradens and the editor-in-chief of the newspaper "Diena" Sarmīte Ēlerte submitted a joint constitutional claim to the Constitutional Court, requesting to declare Articles 91 and 271 of the Criminal Law as unconformable with Articles 91 and 100 of the Satversme. On January 27, 2003 the Constitutional Court received supplement to the constitutional claim, in which the fact that the submitter of the claim was editor-in-chief of the newspaper "Diena" Sarmīte Ēlerte (henceforth – the submitter) was specified.

8. On June 12, 2003 the Saeima adopted the Law "Amendments to the Criminal Law", which took effect on July 15, 2003. Article 3 of the Amendments deleted Article 91 of the Criminal Law. Article 91 was incorporated into Chapter X- "Crimes against the State" of the Criminal Law. It determined :" The committing of knowingly disseminating false information regarding candidates to the Saeima, by publication or other distribution thereof, shall be punished by deprivation of liberty for a term not exceeding three years or a fine not exceeding fifty times the minimum monthly wage". Taking the above fact into consideration proceedings in case No. 2003-05-01 (in the part of the conformity of Article 91 of the Criminal Law with Articles 91 and 100 of the Satversme) were terminated by the organizational meeting decision, held on July 21, 2003. The title of the case was changed to "On the Compliance of Article 271 of the Criminal Law with Articles 91 and 100 of the Republic of Latvia Satversme".

9. **The submitter** of the constitutional claim points out that Article 271 of the Criminal Law (henceforth – the challenged legal norm) violates her rights, determined in the Satversme and international instruments, because of the following circumstances:

9.1. The State official and any other person both are ”persons”, thus they are in comparable conditions. The official has a specific status. As the European Court of Human Rights (henceforth – the Court of Human Rights) has concluded that depending on the status of a person a differentiated attitude is admissible. However, only in case if it demands a different legal solution.

The differentiated attitude shall be impartialand motivated, it has to comply with the legitimate aim and be proportionate, namely, the aim to be reached shall be proportionate with the means used. The Court of Human Rights in its practice has also concluded that - ”the limits of permissible criticism (even if it refers to the dignity and respect) are wider with regard to the politician or an official than with regard to a private person. The challenged legal norm evaluates the honour and dignity of a State official as being much higher than that of an ordinary member of the society. To her mind the State officials have agreed to work in the public interests and the State power endowed to them allows the above persons (as compared to other persons) to better protect themselves and publicly express their viewpoint.

The World Press Freedom Committee has concluded: the fact that in several states, among them also in the democratic Western states, there exist laws, envisaging criminal penalties for defamation and injuring dignity of a representative of public authority, which are still in effect shall be considered as an anachronism. Differentiated attitude, which has been well-founded in separate periods of history, shall not be justified in a democratic society.

The especially favourable attitude towards officials, which follows from the challenged norm, has no justifiable and objective excuse. It is not proportionate with the aim to be reached and thus Article 91 of the Satversme has been violated.

9.2. The submitter stresses that the Court of Human Rights has determined several principles with regard to freedom of expression: restrictions shall be interpreted narrowly and the necessity of the above restrictions shall be carefully determined: the press has to carry out the functions of ”a watchdog”; the notion ”necessary” in the understanding of Article 10 of the Convention means ”a pressing social need”; the court shall evaluate the restrictions after taking into consideration the interconnection of the case and shall determine whether the restrictions are proportionate to the legitimate aim to be reached as well as whether its justification is important and sufficient.

The submitter notes that the practice of Latvian courts testifies that in case of demeaning person's reputation and dignity, the phrases "slandering" and "demeaning of dignity" in the understanding of Article 2352a of the Civil Law of Latvia may be interpreted not only as news but also as a viewpoint. This interpretation can be found in the Supreme Court Senate November 14, 2002 judgment in case No. SKC-604. In its turn the Court of Human Rights has repeatedly pointed out that in the understanding of Article 10 of the Convention there is a difference between facts and assessment, as it is possible to prove the existence of facts, but it is impossible to prove assessment. Thus – to her mind- the restrictions included in the challenged legal norm do not comply with the principle of narrow interpretation of restrictions and the necessity of careful determining of restrictions.

She states that the Court of Human Rights in its practice has concluded that the potential penalty scares journalists and deters them from participation in political discussions, which might influence public life. The submitter holds that the legal norm, which envisages imprisonment and fines, influences the right of the journalists to impart information and also the right of the society to receive this information. It happens even when the particular penalty is not embodied. When taking into consideration the fact that the profession of journalists is connected with writing publication on the performance and activities of the State institutions and officials, there exists a possibility that the above norm may be applied to journalists as well.

Restrictions may be necessary in a democratic society if there is no possibility of reaching the particular aims with other means, which are restrictive in a lesser degree. Public power shall not be used while protecting against defamation or offence. To the mind of the submitter it is possible to protect dignity and respect under the civil procedure and there is no need to apply criminal penalty.

The restriction shall be proportionate and its justification – sufficient and of importance. The submitter holds that restrictions of freedom of expression, which follow from the challenged legal norm, are not proportionate and needed in a democratic society, thus – they are at variance with Article 100 of the Satversme.

Besides, she stresses that lately the tendency to repeal laws, which envisage criminal penalties for defamation and offence, is

taking place in many states. Japan, Sweden, Southern Korea, Yugoslavia, Argentina and several other states have already repealed the above laws.

In its turn, in those democratic states, where these laws are still in effect, like Denmark, France, Netherlands, Norway, Portugal, they are not applied or are narrowly interpreted as the protection of the right to freedom of expression is being taken into consideration.

10. The Saeima in its written reply points out that the challenged legal norm is not at variance with the legal norms of the Satversme because of the following circumstances:

10.1. Both- the Satversme and the International legal norms permit restrictions to the right of freedom of expression. In accordance with Article 116 of the Satversme protection of the rights of other people is the reason for the permissible restrictions. The international legal acts also protect dignity and reputation of persons. Article 10 (the second part) of the Convention stresses that the exercise of the right to freedom of expression is connected with duties and responsibility, thus it may be subject to such restrictions or penalties as are prescribed by law and necessary in a democratic society for the protection of the reputation or rights of others.

Article 100 of the Satversme does not include the right of disseminating false information, namely –fictions and lies. In its turn the Press Law makes it an obligation for the journalist to impart true information but the editor shall be responsible for the contents of the material to be published. The Law also forbids publishing information, which defames physical or legal entities and brings the person into disrepute.

Thus – to the mind of the Saeima - freedom of expression is not absolute and does not mean permissiveness, besides the responsibility, envisaged in the challenged norm does not violate the right of the submitter to impart information. The responsibility for disseminating untrue news, which are defamatory, determined in the law, to the Saeima viewpoint should be evaluated as implementation of the provisions of international legal acts, taking into consideration also the fact that every Member State shall establish efficient means of legal protection to avert violation of the rights and freedoms of persons. Article 95 protects human honour and dignity, thus the right to the protection of human honour and dignity is among

those fundamental rights of a person, which are guaranteed by the Satversme.

From the challenged legal norm does not follow that journalists shall be called to account for expressing a viewpoint or criticizing the performance of an official. Liability sets in only if untrue news or facts defaming a person are disseminated, and such activities cannot be regarded as the ingredient of fundamental rights.

10.2. The Criminal Law differentiates criminal offence connected with committing of defamation or bringing into disrepute on the basis of the status of the victim. This differentiation is objectively justified by the nature and principles of the system of Criminal Law. Thus one cannot hold that differentiated sanctions are discriminating in the understanding of Article 91 of the Satversme. The doctrine of the criminal law does not distinguish types of the object of criminal offence – the organized (group) object and the direct object. Reference to organized object has been included in several titles of the Criminal Law sections. The Saeima expresses the viewpoint that the group object means the interests (of one type or several mutually connected types), which are endangered by a group of criminal offence. In its turn the direct object means the interests, endangered by a specific criminal offence and which are protected by a concrete norm of the Criminal Law. Constituent elements of the criminal offence of several cases separate the main direct object and the additional direct object. The main direct object means the interests, which are always endangered by a certain criminal offence and to protect the object a specific norm has been adopted. In its turn the additional direct object means interests, which in other cases would be regarded as the direct object of an independent criminal offence, but in the particular (concrete) case should be protected together with the direct object, because detriment is being caused by the offence. As the offence, envisaged in the challenged norm in comparison with other norms of the Criminal Law, which protect the dignity and reputation of a person, has different object of threat, the norms establish differentiated penalties. Determination of a more severe penalty for bringing an official into disrepute to the mind of the Saeima might be motivated by the fact that in this case real harm has been caused not only to the dignity of the official but also to the interests of the State administration. Besides, the Saeima holds that in this case the official has been defamed only because he/she performs the duties of office. Thus defamation of the dignity of a state official

not only brings into disrepute the particular official but also creates distrust towards the system the official represents.

The challenged norm may not be applied if the information is true and objective and is not directed towards defamation of the dignity of the official. It is proportionate to the legitimate aim as it restricts the mass media only with regard to intentional bringing the official into disrepute and intentional disseminating of false news. Thus the challenged legal norm does not restrict freedom of expression but assigns the mass media with the duty of verifying truth of the information and ensuring that the dignity of the particular official, who carries out the duties assigned to him/her, is not violated.

The Saeima notes that differentiated liability for defamation of dignity and respect of persons and officials is determined also in the laws of other democratic states, e.g., in Germany, Denmark, Estonia, Lithuania, Poland, Spain.

11. When preparing the case for review, the Constitutional Court asked several persons to express their viewpoint on the compliance of the challenged norm with legal norms of higher legal force – on fundamental rights, international rights and those of the European Union, as well as on the conformity of the challenged norm with the principles of the democratic state, stressing also the influence of the norm on the society.

11.1. Olafs Brūvers - the head of the State Human Rights Bureau has pointed out that when determining the limits between the right to freedom of expression and the right to the protection of dignity and respect, it is necessary to ensure that a certain balance exists, so that none of the above rights is disproportionately restricted.

When envisaging a more severe penalty for defamation of the dignity and respect of the representative of the State authority or other official than for defamation of the dignity and respect of a private person, one cannot hold that the benefit of the society is greater than the harm done to the individual; therefore this restriction is not proportionate. Besides, in Latvia everybody has the right to defend oneself against defamation of dignity and respect under the civil procedure and it would restrict freedom of expression in a lesser degree.

However, in some cases of restriction of freedom of expression, it is necessary to use means of protection of the Criminal Law, e.g.

in cases when the offender is unknown. The Court of Human Rights, when reviewing the case *Tammer v. Estonia and Constantinescu v. Romania* has not established that the right to freedom of expression was violated because the person was held criminally liable. In its turn in the case *Castells v. Spain* the Court of Human Rights concluded that the government should not use criminal procedure for protecting its dignity and respect.

The dignity of an official might be protected by general norms of the Criminal Law, which envisage liability for the defamation of person's dignity and respect. Olafs Brūvers holds that the challenged norm may create the situation when people lose courage and refrain from criticizing state officials and that is not in the interests of a democratic state. Officials to his mind shall be subjected to a more comprehensive criticism than private persons. In a democratic system the activities (performance) or inactivity of the government shall be subjected to careful control not only by the legislators or judicial power but also by press and society.

Olafs Brūvers holds that in a democratic society there is no need for sentencing a person to deprivation of liberty or arresting him/her only because the person has insulted somebody. To his mind the restriction of the right to freedom of expression is disproportionate and at variance with Article 100 of the Satversme and international legal norms.

He holds that the challenged legal norm is unconformable also with the principle of equality and thus – at variance with Article 91 of the Satversme and international legal norms.

11.2. **The sworn advocate and member of the group, which elaborated the Criminal Law Dr.iur. Aivars Niedre** holds that the submitter of the claim in her application has not analyzed the internal legal acts in aggregate, but has only mentioned separate norms without connecting them with the legal act itself, thus to his mind – she has disclosed them unilaterally.

He stresses that in the challenged legal norm the legislator has not evaluated the dignity and respect of a state official more highly as the norms of the Criminal Law envisaged for offences have different objects of threat. By taking into consideration the diversity of the objects, determination of differentiated liability is justified. Liability of a higher degree for defaming the dignity of an official has been determined not because the dignity of one

person is greater than that of another persons, but just in connection with the distinctive object of threat.

In its turn the provision that the limits of criticism with regard to the official are wider than those with regard to any other person shall be observed by the courts of Latvia, when applying the Law. It shall not be attributed to the law but to its application.

When elaborating the Criminal Draft Law, its norms have been approximated with the norms of Criminal Laws of foreign states, especially with those of the European states. Conclusions of foreign specialists have been received. Norms of similar contents can be found e.g. in the German Criminal Law.

11.3. Dr.hab.iur. Professor Uldis Krastiņš – the Head of the Latvian University Criminal Sciences Department holds that the challenged legal norm does not restrict freedom of expression. To his mind the challenged legal norm is a specific norm, but norms, which envisage liability for the protection of dignity and respect of any person, in its turn, are norms of the Criminal Law. When injuring the dignity and respect of a State official, the guilty person primarily turns against the State administration, which is represented by the official, who carries out his obligations. This legal norm has been created just to protect the administrative procedure. Thus – to his mind – the legislator has not evaluated the dignity and respect of the State official as being higher than dignity and respect of any other person. Understanding of such categories of ethics as dignity and respect do not change and do not depend on the status of a person. Therefore the challenged legal norm does not oppose equality of people before the law and the courts.

The Latvian Criminal Code, which became invalid at the moment of the Criminal Law taking effect, included a special legal norm, envisaging liability for offending a judge or an assessor.

In the criminal law and the civil law notions ”viewpoint”, ”dignity”, ”respect” and ”defamation” are interpreted differently. In criminal law defamation means intentional dissemination of false (invented), disreputable and not corresponding to truth information. In its turn dissemination of true information, as well as criticism and expression of the viewpoint may be regarded as demeaning of dignity only if it is done in the form, insulting person’s dignity and respect. Thus, in difference from the civil law, the criminal law viewpoint is not considered to be the object of defamation, but its expression shall be regarded as demeaning

of dignity only then, if it is at variance with the generally accepted morality as well as rules of behavior and mode of life. As regards specific categories of persons, like representatives of mass media – expression of viewpoint is considered as demeaning of dignity also if it contradicts the legal norms of specific instructions. If the information (news) are true and the way of expressing it is not insulting, dissemination of it cannot be qualified as defamation or demeaning of dignity, even though if the information (news) insults, shocks or inconveniences somebody.

11.4. **The Rector of the Latvian Police Academy – Dr.iur., Professor Ārija Meikališa** points out that the specialists of the Latvian Police Academy hold that the challenged norm complies with the legal norms of higher legal force. She stresses that the challenged legal norm restricts the right to freedom of expression; however, the restriction is in conformity with Article 116 of the Satversme – it protects the democratic structure of the State and public safety. The offence envisaged in the challenged legal norm threatens the orderliness of State administration, as there is a reference in the Article, which establishes that the above unlawful activities are committed in connection with persons, carrying out the duties assigned to them. In its turn, if defamation and demeaning of dignity is not connected with the fulfillment of duties, assigned by the State, criminal liability sets in on general basis. Thus one cannot declare that the state officials are in a privileged status as concerns demeaning of personal dignity. Besides, the challenged legal norm does not determine liability for criticism, as criticism is not connected with disseminating of untrue information, defamation and demeaning of dignity.

11.5. **Sandris Laganovskis – the Director of the Republic of Latvia Ministry of Justice International and European Rights Department** expresses the viewpoint of the Ministry of Justice that the challenged legal norm complies with the laws of the European Union and international rights. It has been incorporated into the Law with the aim of protecting the democratic structure of the State. Article 100 of the Satversme does not envisage the possibility of intentional dissemination of untrue information and defaming other persons either. Article 10 of the Convention also envisages restrictions to freedom of expression. Restrictions of human rights shall be proportionate with the legitimate aim to be reached. It is not possible to determine general and unified guidelines to the principle of proportionality; it has to be established in every single case by taking into consideration

circumstances in the case. The practice of international and European courts, when reviewing specific cases, has been different.

11.6. **Associate professor of the Latvian University Faculty of Social Sciences Ābrams Kleckins** has assessed that both parties have convincing viewpoints on the case and the dispute is on principles. If two well-grounded viewpoints on one and the same issue are mutually contradictory then to his mind it means that the problem cannot be solved by simply declaring that one of the viewpoints is correct. In conformity with the theorem on imperfection essence of no system may be understood without discussing it in a wider scope or considering it as a part of a larger system, which establishes its aims. As concerns the society and the State both the represented parties- representatives of mass media and the representatives of the state administration – are only and solely subsystems and their activities should be evaluated by taking into consideration their adequacy with the aims and provisions on activity formulated by the meta-system, and in this particular case – depending on the conformity with the Satversme.

Both – freedom of press as well as freedom of expression and protection of the dignity and respect of the officials in situations, when they are representing the State have not been established to grant privileges to journalists or officials but just to allow them with their activities efficiently advance welfare of the state and protection of interests of its residents. Only for this reason and as long as it is ensured!

However, in practice ”defamation” or disseminating of untrue news is the consequence of the fact that the representatives of the State administration intentionally or unintentionally and in different ways limit the public access to essential information, especially during the period of elaborating and passing laws and resolutions. Therefore the right of the society and the residents to receive information, which concerns them, shall be realized and then defamation of officials will not take place. Democratic freedoms are not compatible with irresponsibility and permissiveness of mass media. However, the legislator has to clearly formulate what shall be understood by notions ”viewpoint”, ”opinion and their synonyms.

12. **Elita Stivriņa – the Deputy Head of the Ministry of Justice Court Department** was asked to submit information about the cases on

defamation and demeaning of person's dignity and respect, which have been reviewed at the courts of Latvia.

The Ministry of Justice in its written reply to the Constitutional Court points out that 186 civil cases have been reviewed at the courts in the period from 1999 to 2002, and out of them the claim was satisfied in 58 cases.

In its turn two persons have been sentenced on the basis of the challenged legal norm in the above period. The Constitutional Court requested and received the copies of both the above court judgments. On September 26, 2001 the Rēzekne Court has found a person guilty for defaming the dignity and respect of three judges, who were performing the duties, assigned to them. The person was convicted to deprivation of liberty for a period of six months. By its November 7, 2002 Judgment the Jelgava Court has found a person guilty for defaming the dignity of the procurator, who has been carrying out the duties assigned to him. The person was sentenced to 96 hour long community service.

The competence of the Constitutional Court does not envisage control of validity of the court of general jurisdiction decisions. In none of the above cases the convicted persons made use of their right to appeal against the judgment at the court of higher instance. Thus they have not questioned the validity of the judgment.

13. At the Court session **the submitter of the claim S.Ēlerte** backed the viewpoint expressed in the claim, namely, that the challenged norm is at variance with the legal norms of higher legal force. She voiced the point of view that by the challenged norm the dignity and respect of an official is considered as being more valuable than the reputation of any other member of the society. She expressed the conviction that a person should not be imprisoned for uttering a word, even if the word is sharp or insulting. To her mind the challenged legal norm prevents the journalists from carrying out their duties, inter alia such duties, the aim of which is to avert absurdities in the activities of the State administration. The society is interested in critical evaluation of persons, to who it for some time has passed over its authority. The Court of Human Rights in several of its judgments has also stressed that politicians and officials shall be protected from criticism, sharp and attacking assessment of their activities in a lesser degree than private persons.

Public authority, granted to officials, makes their positions much stronger and gives to them more possibilities of publicly protecting themselves. The journalists in their turn are unprotected. Small newspapers will introduce self-censorship just because of the norm.

The submitter stresses that the journalist always expresses its critical, attacking and sharp viewpoint and thus the challenged legal norm protects the officials also from listening to viewpoints. The challenged legal norm, just as Article 2352a of the Civil Law, does not demand clarifying whether the official has been offended, when a viewpoint on him/her or insulting information has been expressed. In the last 12 years since the renewal of the independence the Latvian court practice has proved the above while reviewing civil cases on defamation of dignity or respect.

Besides the State administration has no interests of its own. The society has interests and the restrictions, incorporated into the second part of Article 10 of the Convention refer to the interests of public safety. The submitter holds that freedom of expression shall not be interpreted narrowly and they should not be attributed to State administration. Freedom of expression and not the officials, who are well protected from the society, is the cornerstone of democracy.

When answering to the question of the justices the submitter explained that no common code of ethics was binding on the journalists of Latvia. The newspaper ”Diena”, the editor of which the submitter is, has elaborated its Code of Ethics and it comprises one part of the labour contract. Thus, if the journalist violates the above code, he/she may be dismissed. Many newspapers do not have the Code of Ethics.

14. **At the Court session J.Briede - the representative of the submitter** voiced the viewpoint that the challenged legal norm has determined restrictions to freedom of expression in an indistinct manner. The aim of the legal norm – protection of the interests of the State administration – has been established as a legitimate aim neither in the Satversme, nor in the Convention. It may be justified just as regards public safety, which is represented by policemen and other law enforcement officials but not with regard to all the officials. Thus the challenged legal norm does not clearly determine the legitimate aim. She holds that the severe penalty – deprivation of liberty - envisaged in the challenged legal norm is at variance with Article 100 of the Satversme and Article 10 of the Convention.

Recently criminal penalty for defamation and demeaning of dignity and respect has been revoked in Bosnia and Herzegovina as well as in many other states.

When answering to the question of the justices and the representative of the Saeima, the representative of the submitter acknowledged that to determine restrictions to freedom of expression

with regard to dissemination of untrue information was justifiable. However, to her mind the challenged norm refers to any information, also to true information, which may demean the dignity and respect of a person.

The representative of the submitter could not name any situation when a case had been initiated against a journalist on the basis of the challenged norm.

She acknowledges that the challenged norm protects also the dignity and respect of the judges and in this case the restriction has a legitimate aim. If the challenged legal norm protected only the dignity and respect of the judges then it would not be challenged. The submitter S.Elerte also agreed with this viewpoint.

15. **At the Court session the representative of the Saeima G.Kusiņs –** upheld the attitude, expressed in the Saeima written reply, namely, that the challenged norm was in conformity with the norm of higher legal force. He voiced the viewpoint that the submitter had erroneously interpreted international legal acts. To his mind the practice of the Court of Human Rights stresses that the main objective of mass media is to disseminate information and ideas, but certain bounds shall not be violated. Freedom of expression is not absolute and does not mean permissiveness. It is necessary to secure a fair balance between freedom of expression and the dignity and respect of other people.

The challenged legal norm envisages criminal liability only in cases when the dignity has been intentionally defamed and only if it has been done because of the official carrying out the duties, assigned to him/her. G.Kusiņš acknowledges that the challenged legal norm has not been extensively formulated and out of the legitimate aims, included into it the most important is the protection of dignity and respect of other people. The second legitimate aim to his mind is the protection of the judicial power and its objectivity. Protection of the challenged legal norm is necessary for certain categories of officials, like judges and policemen, to carry out the duties assigned to them. Thus he holds that the means incorporated into the challenged norm are proportionate for reaching the legitimate aims.

In compliance with the Criminal Law the violation, anticipated in the challenged legal norm, shall be qualified as a criminal breach but not a crime. Therefore there is no reason to declare that it is a severe offence and that severe sanctions are envisaged for it.

The aim of the penalty envisaged in the challenged legal norm is to detain persons from unlawful activities and make them remember their duties and liability.

G.Kusiņš expressed the viewpoint that because of its structure the challenged legal norm is sufficiently general and the courts shall apply it in accordance with the Satversme, Convention and the conclusions of the Court of Human Rights.

When answering to the questions asked by the justices the representative of the submitter stated she considered it necessary that the challenged legal norm should envisage less severe penalties. However, in this case the press shall reach an agreement on the code of ethics and implementation of its norms with the help of the State, e.g., by creating the institute of ombudsman, which determines liability for the objectivity of the news (information).

The notion of the Criminal Law " the interests of the State administration", mentioned in this norm shall be qualified as the threatened object but not as the legitimate aim.

16. At the Court session **the invited person – the researcher of the Latvian University Institute of Human Rights Artūrs Kupčs** acknowledged that during the last years no journalist has been convicted on the basis of the challenged norm in Latvia.

He expressed the point of view that as regards protection of dignity and respect the notion the " State official" has been too extensively determined. The Court of Human Rights has concluded that the above norm is a necessity with regard to judges. Besides, there is a rational basis for determining the above protection to the highest officials of the state, for example, the President and the Prime Minister. However, the norm shall not be attributed to politicians , as they pass decisions, essential for the society and the society would be harmed if the mass media would not criticize their activities.

A.Kučs pointed out that the penalty of deprivation of liberty shall be applied only in exceptional cases but not used as general practice.

17. **The invited person Dr.iur. Aivars Niedre** at the Court session voiced the viewpoint that the challenged legal norm is in compliance with the norms of the Satversme and the courts shall secure its right application in accordance with the practice of the Court of Human Rights. The law shall be known, studied and correctly applied. The challenged legal norm, like many other norms of the Criminal Law, has the meaning of general prevention.

The Criminal Law determines differentiated liability also in other cases. Thus differentiated liability is established also for murder and serious bodily injury to a person, who is carrying out his/her professional duties, e.g., for criminal offences to a journalist - in comparison with other persons - higher liability is determined.

18. **The invited person - the authorized representative of** the Head of the State Human Rights Bureau Olafs Brūveris **— the Lawyer of the Analyses Department of the Human Rights Bureau Anita Kovaļevska** expressed the viewpoint of the State Human Rights Bureau that the challenged legal norm is unconformable with the norms of the Satversme and the Convention.

    Making references to the practice of the Court of Human Rights she stated that the State itself may decide what laws to pass. However, in case if the interests of the government are violated, it need not make use of the criminal law as means of protection. In a democratic society it is not acceptable to inflict a penalty of deprivation of liberty for a statement. Free discussion shall be more highly evaluated than the protection of the rights determined in the challenged legal norm.

19. At the Court session **the invited person- Dr.iur. Professor Valentija Liholaja** expressed the viewpoint that the challenged legal norm complies with the Satversme. She pointed out that the challenged norm - in comparison with the general norms of the Criminal Law on defamation of dignity and respect of persons - has qualified constituent elements; therefore the manifestation of the objective part of the norm is identical and cannot differ.

    The delict of defamation, incorporated into the challenged legal norm as well as into Article 157 of the Criminal Law shall be understood narrowly: 1) it includes only knowingly untrue information and not the viewpoint, besides, the offender knows that the information is untrue; 2) the untrue information, distributed knowingly and intentionally defames the dignity and respect of the person and the offender knows it; 3) for all that the offender intentionally distributes the information.

    In its turn in case of demeaning the dignity as envisaged for in Article 156 of the Criminal Law, the information may be true, but the way of expressing it may be insulting. Thus, if the information, furnished by the journalist, is true even though offending, shocking or disturbing or if it is criticism – then the challenged norm does not envisage liability for it. Person may be held criminally liable only if its guilt has been proved.

She stresses that every state passes and elaborates its laws in accordance with its traditions and experience.

20. **The invited person - the Associated Professor Ābrams Kleckins at the court session** expressed the viewpoint that the main issue of the reviewed case is on the understanding of democracy and the public role of mass media. As the representative of the journalism, he is against criminal liability in this sector.

He expressed the point of view that no physical person shall be granted different rights than those experienced by other people. However in a democratic society differentiated rights may be granted to a person, who is carrying out the assigned duty. The above person does not experience any other privileges and this fact shall be attributed to both – the journalists and the officials. The right of the journalist to freedom of expression follows from the right of the society to receive information, thus this right, granted to the journalists, also follows from their professional duties. Thus both – the journalist and the official when he/she does not carry out the duties are protected just like any other person.

Ā. Kleckins holds: even though the fact that Latvia is a democratic state has been fixed in the Satversme, it does not mean that there is a democratic society in Latvia. Mass media, which could regulate its professional ethics and would have a generally acknowledged code of ethics, has not been created in Latvia. To his mind the journalists should create a mechanism of self-regulation e.g. like that existing in Germany. The journalists shall protect their own dignity among other things also to protect people from dishonest journalists.

However, the journalists should express their viewpoint in a decent manner – sharply but not in an unseemly manner. The legislator in its turn shall clearly formulate, what a ”viewpoint” is.

Ā.Kleckins stated, that the democratic procedure and not the person itself were endangered in case if an official, who was carrying out his duty, were insulted. Therefore the liability shall be greater in this case. He expressed the point of view that with the development of democracy penalties for such offences would be decreased.

The concluding part

21. Freedom of expression belongs to the human rights of the first generation and is considered to be one of the most important

fundamental human rights. Freedom of expression is enshrined in the fundamental law of any state and it belongs to civic and political rights.

Freedom of expression in its public aspect includes also freedom of press. Thus the term ”freedom of expression”, which is incorporated into Article 100 of the Satversme, includes also the notion ”freedom of press” (*see item 1 of the concluding part of the Constitutional Court June 5, 2003 Judgment in case No. 2003-02-0106).* Thus any limitation of freedom of press in a wider sense shall be understood as limitation of freedom of expression.

The right to freedom of expression is enshrined in the Fundamental Law of Latvia – the Satversme - as well as in several international legal acts binding on Latvia (*see Items 3.1 -3.4. of this Judgment)* and is declared to be an integral part of human rights.

22. The Saeima in its written reply and the Saeima representative at the Court session reasonably pointed out that the right to freedom of expression was not absolute and did not mean permissiveness. It follows from the Satversme and international documents on human rights binding on Latvia that the right to freedom of expression may be restricted (*see Items 4.1 and 4.2. of this Judgment).* The State may determine restrictions to freedom of expression in cases when the right of a person to freedom of expression may affect rights of other persons as well as in cases when freedom of expression creates clear and direct threat to the society (*see Item 1 of the concluding part of the Constitutional Court June 5, 2003 Judgment in case No. 2003-02-0106 and Manfred Nowak. U.N. Covenant on Civil and Political Rights. CCPR Commentary.- Publisher N.P.Engel, Kehl, Strasbourg, Arlington, 1993, p.337).*

Article 116 of the Satversme establishes that the right to freedom of expression may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic structure of the State, public safety, welfare and morals. The second part of Article 10 of the Convention in its turn envisages that the exercise of freedom of expression may be subject to such restrictions as are prescribed by law and are necessary in the interests of national security, territorial integrity and public safety for the prevention of disorder or crime, for the protection of health or morals, for protection of the reputation or rights of the others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

The Satversme has determined restrictions to freedom of expression in a general way; the Convention in its turn presents more specific criteria.

Therefore as concerns admissible restrictions of freedom of expression in its wider sense, the norms of the Satversme shall be interpreted in the understanding of the Convention.

Fundamental rights may be subject to restrictions only in cases envisaged by the Satversme and by observing the principle of proportionality. Thus restrictions of freedom of expression shall be: 1) determined by law; 2) justified by a legitimate aim; 3) proportionate to this aim.

23. It took ten years to elaborate the draft Criminal Law. The draft was widely analyzed and discussed. The Latvian University Faculty of Law lecturer and member of the group, which elaborated the above draft, Agra Reigase in the summary of the project , which was signed by the then Minister of Justice, pointed out that the draft had been submitted to all the Ministries and law enforcement institutions with the request to express their conclusions. Several references of the foreign scientists and conclusions of the experts of the European Council were also received. In September of 1995 the second revised variant of the draft was published and the Republic of Latvia lawyers discussed it. Proposals by the Republic of Latvia Prosecutor General's Office, based on experience were incorporated into it.

The draft Criminal Law was adopted by the Saeima with an overwhelming majority of vote: at the first reading – unanimously; at the second reading – with one voice "against", but at the third reading – with three voices "against" and 8 voices "abstained" (*see the Verbatim reports of the Republic of Latvia 6th. .Saeima winter session February 6, 1997 meeting, the 6th. Saeima autumn session November 11, 1997 meeting and the 6th. Saeima spring session May 18, 1998. meeting).*

Thus the restriction incorporated into the challenged legal norm has been determined by law.

24. Freedom of expression is one of the necessary preconditions for creation of the society, based on mutual respect. Thus the right to freedom of expression is closely connected with the right of a person to the protection of dignity and respect.

Two fundamental rights guaranteed to the person are opposed in the present case: the right to freedom of expression and the right to inviolability of dignity and respect. Just like the right to freedom of expression, inviolability of human dignity and respect is fixed both in the Satversme and several international human rights acts, binding on Latvia (*see Items 2.1 -2.3 of this Judgment).*

The Court of Human Rights in its practice has also concluded : ”Article 10 of the Convention does not guarantee unlimited and absolute freedom of expression even with regard to publication of significant for the society information. The second paragraph of the above Article envisages that ” the exercise of these freedoms carries with it duties and responsibilities”, which shall be attributed also to mass media. These duties and responsibilities become significant (…) if the reputation of private persons and the rights of other persons are violated”” (*the Court of Human Rights May 20, 1999 Judgment in case Bladet Tromso and Stensaas v. Norway, para.65).*

The Court of Human rights has reviewed many cases connected with the potential violation of the rights determined in Article 10 of the Convention and has repeatedly analyzed particular episodes, in order to find a reasonable balance between the opinion or viewpoint expressed by a person and violation of dignity and respect of another person. As the Court of Human Rights does not realize abstract control of legal norms but evaluates real circumstances of a particular case, therefore – even when reviewing similar cases on freedom of expression and the right to the protection of human dignity and respect – the conclusions of the Court of Human Rights have been differing. The President of the Court of Human Rights Lucius Wildhaber has concluded: ” The issue on the limits of freedom of expression has not been completely determined even at the European Court of Human Rights. (…) When reviewing cases on freedom of the press, we always strictly separate which information shall be evaluated as the viewpoint of the journalist or some other person, and which – as the news material. News materials shall always be true, but the viewpoint is subjective and emotional, therefore it may be very unpleasant for a certain person. The only restriction with regard to expression of the viewpoint is the Criminal Code of every state” (*the interview of the reporter Inta Lase with Lucius Wildhaber, published in the newspaper ”Diena” on March 13, 2003).*

Reasonable is the viewpoint of the Saeima representative, expressed at the Court session that - when determining limits between freedom of expression and the right to the protection of dignity and respect – it is necessary to establish fair balance (*see Item 15 of this Judgment).* A similar point of view was expressed by the head of the State Human Rights Bureau (*see Item 11.1 of this Judgment).* Protection of the fundamental rights shall be balanced by law and if some human rights are enlarged one should ensure that the other human rights are restricted in a lesser degree.

25. When establishing restrictions to the rights of persons, the restrictions shall be justified with a legitimate aim e.g.: rights of other persons, democratic state system, public security, welfare and morality. Well-

grounded is the argumentation, mentioned in the Saeima written reply and expressed by the Saeima representative G.Kusiņš as well as by the invited persons A.Niedre and V.Liholaja, namely: that the challenged legal norm has a legitimate aim – to protect the rights of other persons, democratic state system, public security and impartiality of courts. The democratic state system is unthinkable without alignment and protection of the activities of state administration, which in its turn guarantees both – public security and the rights of other persons. Article 10 of the Convention also incorporates the above legitimate aim.

Thus the restrictions to freedom of expression, which are incorporated into the challenged legal norm have a legitimate aim.

26. In compliance with the Criminal Law the criminal offence, envisaged in the challenged legal norm endangers the group object – procedure of administration – and the direct object – the state administration, which is represented by the State official. In the challenged norm the dignity and respect of the State official is the additional direct object. Thus the violation, envisaged in the challenged legal norm, is directed against the activity of the State administration as the direct object of endangerment, and not against the official as the physical entity. If defamation of the dignity and respect of the official is not connected with the fulfillment of the duties assigned by the state, then the criminal liability of the guilty person sets in – it complies with Articles 156 -158, under which the dignity and respect of any person, including that of the official is considered to be the direct object. When analyzing the structure of the Criminal Law we may draw a conclusion that by the challenged legal norm the legislator has wanted to protect the dignity and respect of the State official only in cases when the latter carries out the duties assigned by the State to ensure efficient performance of the State administration.

In its turn ensurance of efficient State administration performance is closely connected with such duties, assigned to persons, which are directed towards the protection of the State and public security, prevention of disorder or crime and maintaining the authority and impartiality of the judiciary. Thus, ungrounded is the viewpoint of the submitter, expressed at the Court session that the state shall not protect it. This kind of protection by restricting freedom of expression is anticipated both in Article 116 of the Satversme and the second part of Article 10 of the Convention.

27. The Court agrees with the opinion voiced at the Court session by the Saeima representative that the legitimate aim of the challenged legal norm shall be separated from the endangered object. The Saeima representative paid attention to the fact that the submitter of the claim and her representative groundlessly consider the object of the challenged

legal norm – the procedure of the State administration – to be its legitimate aim. The conformity of the challenged legal norm with the restrictions envisaged in the Satversme and the Convention may be evaluated only by comparing the legitimate aim established by the challenged legal norm with the legitimate aim determined in the Satversme and the second part of Article 10 of the Convention.

28. The principle of legal equality means that under equal factual and legal circumstances the attitude shall be the same; in its turn under different circumstances it may be diverse. One may agree with the viewpoint of the submitter that it is possible to unite both notions- ”the state official” and ”every person” and use the notion ”person” instead and then these persons may be regarded as being in comparable circumstances. However, in the understanding of Article 91 of the Satversme, the comparable circumstances of the challenged norm are attributed to the dignity and respect of the person and not to freedom of expression. In accordance with Article 19^2 of the Constitutional Court Law, the person experiences the right of submitting a constitutional claim to the Constitutional Court only if it holds (and motivates this viewpoint) that a legal norm, which does not comply with the norm of higher legal force violates **his/her** fundamental rights, determined in the Satversme. The notion ”violates” has been incorporated in the law to dissociate the constitutional claim from the claim for general benefit. It establishes that there shall exist a well-grounded possibility of the challenged norm violating the rights of the applicant (*see the Constitutional Court February 22, 2002 Judgment in case No. 2001-06-03, Item 2.4 of the concluding part).*

As the challenged legal norm and those norms of the Criminal Law, which protect the right of every person to the protection of dignity and respect, have different objects of protection, then in the understanding of Article 91 of the Satversme as regards freedom of expression, they are not in comparable circumstances.

Thus, the Constitutional Court has no reason for evaluating the conformity of the challenged norm with Article 91 of the Satversme on the basis of the constitutional claim of the submitter, as in the aspect of the right to freedom of expression the challenged norm does not include the groups of persons, which are in comparable circumstances.

29. Restrictions of freedom of expression in order to protect person’s dignity and respect are determined also in other norms of the Criminal Law, inter alia, in Article 158, which determines the sanction of deprivation of liberty. The claimant in her constitutional claim does not challenge this Article. Determination of sanctions for criminal offences is connected with the level of democratization of the state, thus the issue

– as a political issue - is within the competence of the legislator. Therefore the Constitutional Court, taking into consideration the principle of self – derogation, does not evaluate the compliance of the proportionality of the sanction, included in the challenged norm, with the elements of criminal offence.

30. The challenged legal norm envisages criminal liability for intentional defamation of dignity and bringing into disrepute. In conformity with the theory of criminal law the challenged legal norm incorporates the direct intention of the offender, namely, the guilty person wishes to bring the representative of the state power or the state official into disrepute or defame the dignity of the person just because it is performing the duty assigned to it. A direct intention, which is being accomplished with the help of intentional criminal offence, means that the person, who has committed the criminal offence, has envisaged the consequences of the offence and has wished their setting in (*see: U.Krastiņš, V.Liholaja, A.Niedre Commentaries to the Criminal Law, Book I. The General Part. Riga, "AFS", 1999, p.75).*

30.1. Defamation of dignity, envisaged in the challenged legal norm may be expressed in an - insulting to the official - oral or written form or in an action (e.g. spit, punch, indecent gesture). It may be done only with a set purpose, besides, the offender is aware that he/she does it because the representative of the power or a state official is performing the duties, assigned to him/her (*see: The Criminal Law. The General and the Specific Part, under the scientific editorship of Prof. U.Krastiņš. Riga. The Agency of the House of Courts, 1999, p. 297).*

Dignity in the understanding of the Criminal Law is the public assessment of a particular person, and its criterion is the behavior of the individual, his/her attitude to social and mental values, society, people (*see: U.Krastiņš, A.Liholaja, A.Niedre. Commentaries to the Criminal Law, Book IV. The Specific part. Riga, "AFS", 1999, p.100).*

At the Court session A.Liholaja with a good reason pointed out that the delict of disrepute, anticipated in the challenged legal norm shall be interpreted narrowly: 1) it includes only an intentionally untrue information but not a viewpoint and the offender in this case knows the information to be untrue; 2) the intentionally untrue information defames the dignity and respect of the person and the offender is aware of it; 3) the offender, being conscious of the above, deliberately distributes the information. Moreover, to apply any norm of the Criminal Law, the guilt of the person shall be proved and in cases of doubt shall

be interpreted in favour of the person, who is accused. Thus the challenged legal norm in case of bringing to disrepute does not envisage liability, if the distributed information is true, even if it is shocking or disturbing.

31. Article 100 of the Satversme envisages not only the right of freely expressing one's viewpoint and distributing information but also the right to freely receive it. In essence the right to freedom of expression follows from the public right to receive information. The Court agrees with the viewpoint of the mass media expert Ā. Kleckins that the right to freedom of expression and press is derived from the public right of receiving information and it shall not be regarded as the special right of the journalists. At the April 24, 2003 conference "Ethics of Mass Media: Problems and Solutions" it was also concluded: "The society experiences the right of receiving information – that is an axiom. And the duty and obligation of mass media is to serve the public interests" (*Discussion"The right to receive true, equitable and versatile information". Exchange of viewpoints expressed at the April 24, 2003 conference "Ethics of Mass Media: Problems and Solutions", compiled by the editor of the journal "The Capital" Guntis Rozenbergs; http://www.politika.lv).*

Thus the obligation of press is to distribute true information and in this aspect freedom of expression includes also duties and responsibilities. The Court of Human Rights has also repeatedly pointed out that for journalists the protection of Article 10 of the Convention is available only if "they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalists" (*Human Rights. The 1998 Act and the European Convention, London, Sweet & Maxwell, 2000, p.300; see also the Court of Human Rights Judgment in case Bladet Tromso and Stensaas v. Norway, para.65; March 27, 1996 Judgment in case Goodwin v. United Kingdom, para. 39 and January 21, 1999. Judgment in case Fressoz and Roire V.France, para. 54).*

31.1. Freedom of press is restricted by the Law "On the Press and Other Mass Media" (*see Item 4.3 of this Judgment).* This law also assigns the journalists with the duty of distributing only true information and asks them to refuse from carrying out a task, realization of which is connected with violation of law as well as stresses that journalists shall observe the rights of the State and the rights and interests of legal and physical persons.

31.2. The experience of democratic states testifies that particular sectors are regulated with the help of specific codes of ethics. It refers to ethics of press as well. Thus, e.g., in several Nordic states there exists a unified code of ethics of journalists and a

special executive institution – the Council of Mass Media in the body of which well-known professionals of the sector and other persons are engaged– is created (*see The Finnish Experience. Report of the former journalist of the "Helsingin Sanomat"Juka Rislaki at the seminar "Ethics of Mass Media: Problems and Solutions", which was held in Riga, on April 24, 2003; http://www.politika.lv*). In its turn in Sweden a special press ombudsman has been created, and within its competence there are both – the control over journalists and the protection of the journalists. It reviews definite claims and regulates them without the mediation of court, or it forwards the claim to the court if there is no possibility of reaching adequate result, which satisfies both parties (*see the same source; The self-disciplinary system of the Swedish press. The report of the editor-in-chief of "Swedens Igress Media"Anna Liistead).*

Thereby an efficient mechanism, which helps to ensure a fair balance between the right to freedom of expression and other human rights guaranteed for persons, has been created in many democratic states. Therefore it is self-evident that in these states there is no necessity of using severe sanctions for defamation of a person, which may happen when realizing the absolute right to freedom of expression.

31.3. As concerns the above aspect, regulation of ethical norms and their observation by press in Latvia shall be assessed. The Code of Ethics, adopted by the Union of Latvian Journalists on April 28, 1992 determines the principles of ethics. The Code of Professional Ethics for the journalists of Latvian press, radio and television, adopted on May 14, 2001 also determines up-to-date criteria of ethics for the journalists (*see Item 4.4 of this Judgment).* When evaluating these Codes and comparing them with the codes of other states one may conclude that they determine ethical norms, which are in compliance with the norms of democratic states.

The Latvian journalists have different viewpoints on the necessity of acknowledgement of ethical norms. "As concerns the principles of morality, the Code of Ethics and the experience of Western journalists some media view the issue arrogantly. They hold that immoral is the separation of news from viewpoints and not the manipulation with the readers (…) And we do not have one common code of ethics. The Union of Latvian Journalists may object to this but the organization has no influence upon real life, as it is difficult to find any editorial board, which has officially promised to observe the Code of Ethics" (*Vladislavs*

Sorokins. Immoral Journalistics. Published in the portal http://www.politika.lv on November 19, 2002).

”Let those, who themselves meet the requirements of the codes, compile them. (…) It is dangerous for any politically or professionally weak system to swagger about some ethical codes. (…) I am of the opinion that the Codes of Ethics mean telling lies, when there is no necessity for it” (*Viktors Avotiņš. Poke your nose into deals, but do not steal. Published in the portal http://www.politika.lv on October 1, 2002).*

The editor of the journal ”The Capital” Guntis Rozenbergs has summarized the viewpoints, expressed at the April 24, 2003 international conference ”Ethics of Mass Media: Problems and Solutions”: understanding the necessity of introduction of an efficient self-controlling mechanism, mass media should reach a mutual agreement about the ethical principles being declared for the whole sector of journalistics and the Board of Ethics is to be created. The society and media are still only thinking about self-organizing… (*see: Discussion. The Right of the Society to Receive Accurate, Fair and Versatile Information. Published in the portal http://www.politika.lv on April 30, 2003).*

At the Court session Ā.Kleckins also pointed out that in our society there does not exist such a thing as the journalism medium, which is able to regulate its own professional ethics, therefore it is necessary to create the mechanism of self-regulation.

The right to freedom of expression characterizes the democratic state system and the size of the rights – the democratic society. At the Court session Ā.Kleckins said: ”Yes, it is clearly fixed in the Satversme that we are a democratic state. But that does not mean we are a democratic society. It only means that our legislature conforms with the principles and requirements of a democratic state (…). But in reality we live under”somewhat” different circumstances.”

The Code of Ethics elaborated by the Union of Journalists is internationally represented as the common Code of all Latvian journalists (*see e.g.the Home page of the Tampere University www.uta.fi/ethicnet. Databank for European Codes of Journalism Ethics).* However, as the submitter acknowledged at the court session that none of the above Codes of Ethics is binding on journalists, one may conclude that they are just declarative and the sector of journalism ethics is not put in shape. Thus in Latvia

issues on journalism ethics are settled in accordance with the understanding of ethics by every medium. Well-grounded is the viewpoint expressed at the Court session by the Saeima representative that the press should come to an agreement on the Code of Ethics and implementation of its norms (with the help of the State) by creating a specific institute, like the ombudsman.

32. Reasonable is the opinion of the submitter that in those democratic states, where the restrictions, similar to those of the challenged legal norm, are in effect, they are almost never used or are interpreted narrowly (*see Item 9.2. of this Judgment.)* However, one cannot agree with the statement of the submitter that in court practice of Latvia, review of the above cases differs from this model.

Any constitutionally fixed legal norm, also the right to freedom of expression shall be directly and immediately realized and is mandatory for everybody. The applicant of the norm shall be guided by the interpretation, which is universally used, namely, by observing the norms and principles of legal norms incorporated in the Satversme and international instruments binding on Latvia.

Besides, when applying the challenged legal norm one has to take into consideration the conclusion of the Court of Human Rights: ”The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media. Nevertheless, it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith (*the Court of Human Rights April 23, 1992 Judgment in case Castells v. Spain, para.46).*

Therefore ungrounded is the statement of the submitter at the Court session that the usual court practice in Latvia makes the challenged norm ”dangerous” when reviewing cases on defamation and bringing into disrepute. The challenged legal norm is applied very rarely (*see Item 1.2 of this Judgment)* and no journalist has been sentenced by applying the above norm. As concerns the journalists, then Article 2352a of the Civil Code has been applied, however, the constitutional claim does not challenge the conformity of this Article with the norms

of higher legal force. The submitter tactlessly compares civil and criminal protection of the dignity and respect of a person.

33. The right to freedom of expression has the tendency of widening with the development of democracy in the state. "… as a matter of fact the question is on more extensive issues than on the Article itself. The question is on the understanding of democracy, on the role of mass media in the contemporary society and the state we ourselves are in" (*Ā.Kleckins viewpoint, expressed at the Constitutional Court September 30, 2003 Court session).*

Thus it is essential to evaluate the will of the Saeima deputies – the delegated by the people representatives – when taking the decision on the issue whether the challenged legal norm is needed in the democratic society of our days.

When analyzing the verbatim report of the Saeima May 22, 2003 session, one can see that the deputies of the 8th. Saeima, when discussing the issue on deleting the two legal norms – on the protection of dignity and respect of officials and deputies (candidates to the Saeima) in the Criminal Law- debated about both the questionable norms (*see Item 6.2 of this Judgment).* The majority of the deputies backed the viewpoint that in the democratic society the above norms are not needed. Thus after voting by majority of votes Article 91 on defamation of deputies was deleted from the Criminal Law. Even though the argumentation of the deputies refers to the contents and importance of both norms – on the dignity and respect of the candidates for the Saeima and the State officials, however later, when voting about deleting of the challenged legal norm, the motion did not receive the support of the majority of deputies. The Constitutional Court has not received the motivation to the question why voting about both norms reached different results.

34. The restriction shall be proportionate to the aim, which the legislator has wanted to reach by the challenged legal norm. Proportionality means that the public benefit derived from the restriction of the particular fundamental right shall be greater than the loss the restriction incurs to other rights. The principle of proportionality directly follows from Article 1 of the Satversme and it shall be attributed to all kinds of relationships between the state and the individual if the rights of the individual are restricted.

To assess whether the restrictions of freedom of liberty, incorporated in the challenged legal norm, are needed in the democratic society and whether they can serve as the means for reaching the legitimate aim, one shall verify if the restrictions are socially needed and proportionate (*see*

the Constitutional Court Judgment in case No. 2003-02-0106, Item 4 of the concluding part).

35. Thus it is necessary to make certain what persons are considered as the State officials by the Criminal Law, and how widely the notion ”the State official” may be attributed to the challenged legal norm.

The Criminal Law determines the notion of the state official in a general way, in its turn the Law ” On Prevention of the Conflict of Interest” incorporates both – the general definition and a concretized range of state officials (*see Items 5.1 and 5.2 of this Judgment).* Even though the objective of the Law on Prevention of the Conflict of Interest is directed to determination of the range of duties and responsibilities which undoubtedly is greater as concerns the officials, than that determined for any other person, however the above persons comply with the notion of the State official, determined in Article 316 of the Criminal Law. At the Court session A.Liholaja pointed out that the above definitions differ but do not contradict one another.

When analyzing the notion of the official used in the above laws, it can be seen that it has been too widely defined. The Court has not received affirmation to the viewpoint that all the officials, who in accordance with the notion ”the State official”, which is used in the Criminal Law, perform such duties, which require the special protection by the State. Thus the challenged legal norm determines too wide a range of officials, who shall be protected.

Thus, the challenged legal norm in its present wording is not proportionate to the legitimate aim and is at variance with the right to freedom of expression, which is guaranteed by Article 100 of the Satversme.

36. Taking into consideration the fact that in court practice the challenged norm has been only rarely applied and it has a preventive nature, it is useful to determine a postponed term for declaring the norm as null and void. If the challenged legal norm were declared as invalid as of the date of publishing the Judgment, the loss of the society would be greater than the benefit as the objective of the challenged norm is directed to the protection of those basic values of the democratic society, which are enshrined in Article 116 of the Satversme.

The substantive part

On the basis of Articles 30 – 32 of the Constitutional Court Law the Constitutional Court hereby **rules**:

To declare Article 271 as **unconformable** with Article 100 of the Republic of Latvia Satversme (Constitution) and **null and void as of February 1, 2004,** if up to that time the legislator has not specified the range of officials, who – for performing the duties assigned to them - need the protection of the Criminal Law.

The Judgment takes force as of the moment of its announcement. The Judgment is final and allowing of no appeal.

The Judgment was announced in Riga, on October 29, 2003.

The Chairman of the Court session A.Endziņš